Petition

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Supreme Court of The United States

OCTOBER TERM, 1980

STATE OF WEST VIRGINIA, EX REL.
AIR POLLUTION CONTROL COMMISSION,
Petitioner-Appellant,
v.
ANN GORSUCH, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
Respondent-Appellee.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the United States Court of Appeals for the Third Circuit, or any other United States Court of Appeals, have jurisdiction under the administrative review provisions of the Clean Air Act, 42 U.S.C. § 7607(b)(1), to review an action by the Administrator of the United States Environmental Protection Agency concerning revisions to a State Implementation Plan (SIP), 42 U.S.C. § 7410, for a State not located within the Court's geographical composition, 28 U.S.C. § 41?

2. Is it an arbitrary action, and therefore subject to reversal or remand, for the United States Environmental Protection Agency to withdraw its approval of State Implementation Plan revisions, when the evidence, based on EPA's own investigation, overwhelmingly demonstrates that such State Implementation Plan assures attainment and maintenance of the national ambient air quality standards? 42 U.S.C. § 7410(a)(2)(B).

3. Can the United States Environmental Protection Agency reverse its

previous administrative action approving a State Implementation Plan without stating valid reasons for such reversal when its own rulemaking rationale documents state that failure to approve the SIP is an unreasonable action because the SIP assures attainment and maintenance of the national ambient air quality standards?

4. Which sovereign, the State of West Virginia or the Federal governnment, has the primary responsibility to decide the safety factor and degree of confidence to be given a mathematical model predicting an artificial violation of air quality standards within West Virginia? 42 U.S.C. § 7407.

5. Is it an arbitrary action, and therefore subject to reversal or remand, for Regional Offices of the United States Environmental Protection Agency to apply modelling methods for predicting air quality which are not reasonably uniform in criteria, procedures or policies? 42 U.S.C. § 7601.

Additional Parties to Case Below

A. Appalachian Power Company
B. Commonwealth of Pennsylvania
C. Council of Senior West Virginians
D. Group Against Smog and Pollution, Inc.
E. Monongahela Power Company
F. Monongahela County Citizens for Clean Air
G. Mountain Community Union
H. Ohio Power Company
I. West Virginia Citizens Action Group, Inc.
J. West Virginia Highlands Conservancy, Inc.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF WEST VIRGINIA, EX REL.
AIR POLLUTION CONTROL COMMISSION,

Petitioners,

v.

ANN GORSUCH, Administrator, UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

The State of West Virginia on behalf of its Air Pollution Control Commission hereby petitions for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit for review of a judgment order entered by that Court in the above entitled case on issues of national importance, decided in conflict with other Circuit Courts and upon which the Supreme Court must rule.

OPINIONS AND DECISIONS BELOW

No official court opinions are available in this case. The text of the judgment order denying our petition to the United States Court of Appeals for the Third Circuit is contained in Appendix A. The denial of our motion for rehearing is Appendix B.

The administrative decisions are published at the following locations:

A. Final Rule Approving West Virginia's State Implementation Plan, 43 Fed. Reg. 52239 (November 9, 1978). Appendix C.

B. Proposed Rule Re-Approving West Virginia's State Implementation Plan, 44 Fed. Reg. 64439 (November 7, 1979). Appendix D.

C. Final Rule Disapproving In Part West Virginia's State Implementation Plan, 45 Fed. Reg. 74478 (November 10, 1980). Appendix E.

JURISDICTION

The Supreme Court's jurisdiction is based on 28 U.S.C. § 2101(c) and Rules of

the Supreme Court of the United States, Rule 20.4 (1980).

We seek review of an order of the United States Court of Appeals for the Third Circuit dated September 23, 1981, denying our petition for review of an action by the Administrator of the United States Environmental Protection Agency. Our request for rehearing was denied on October 21, 1981.

CONSTITUTIONAL PROVISIONS STATUTES AND REGULATIONS INVOLVED

(1) Section 107(a) of the Clean Air Act, 42 U.S.C. § 7407(a), states:

> "§7407. Air quality control regions.
>
> "Responsibility of each State for air quality; submission of implementation plan
>
> "(a) Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising each State by submitting an implementation plan plan for such State which will specify the manner in which national primary and secondary ambient air quality standard will be achieved and maintained within each air quality control region in such State."

(2) Section 110(a)(1), (2)(B) and (3)(A) of the Clean Air Act, 42 U.S.C. § 7410(a)(1), 2(b) and 3(A) states:

> "§7410. State implementation plans for national primary and secondary ambient air quality standards
>
> Adoption of plan by State; submission to Administrator; control of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems
>
> "(a)(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a

separate public hearing is involved, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

"(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that-

* * *

"(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, transportation controls, air quality maintenance plans, and preconstruction review of direct sources of air pollution as provided in subparagraph (D);

* * *

"(3)(A) The Administrator shall approve any revision of an implementation plan application to an air control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

(3) Section 305(e) of the Clean Air Act, 42 U.S.C. § 7601 states:

"§7601. Administration

Regulations; delegation of powers and duties; regional officers and employees

"(a)(1) The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter. The Administrator may delegate to any officer or employee of the Environmental Protection Agency such of his powers and duties under this chapter, except the making of regulations, as he may deem necessary or expedient.

"(2) Not later than one year after August 7, 1977, the Administrator shall promulgate regulations establishing general applicable procedures and policies for regional officers and employees (including the Regional Administrator) to follow in carrying out a delegation under paragraph (1), if any. Such regulations shall be designed -

"(A) to assure fairness and uniformity in the criteria, procedures, and policies applied by the various regions in implementing and enforcing this chapter;

"(B) to assure at least an adequate quality audit of each State's performance and adherence to the requirements of this chapter in

implementing and enforcing the chapter, particularly in the review of new sources and in the enforcement of the chapter; and

"(C) to provide a mechanism for identifying and standardizing inconsistent or varying criteria, procedures, and policies being employed by such officers and employees in implementing and enforcing the chapter.

(4) Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1) states:

Judicial review

"(b)(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standards, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7512(b)(1) of this title) any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court

of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412(c) of this title, under section 7413(d) of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 119(c)(2)(A), (B), or (C) (as in effect before August 7, 1977) or under regulations thereunder or any other final action of the Administrator under this chapter which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

(5) Section 305(d)(6)(A) of the Clean Air Act, 42 U.S.C. § 7607(d)(6)(A) states:

> "(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

STATEMENT OF THE CASE

Summary

On November 10, 1981, the Administrator of the United States Environmental Protection Agency in a lengthy federal rulemaking action, unexplainedly reversed his position and partially withdrew his 1978 approval of West Virginia's State Implementation Plan revisions for two coal fired power plants. Such reversal constitutes an arbitrary and capricious action in the most classic sense. The Administrator did not explain why the approval was reversed, and EPA's own rationale

document admits that not to approve such revisions is unreasonable.[1]

The State appealed EPA's decision to the Fourth Circuit Court of Appeals. However, our petition was automatically transferred to the Third Circuit pursuant to 28 U.S.C. § 2112(a) because the Commonwealth of Pennsylvania and several environmental groups had previously filed petitions for administrative review in that Circuit. Even though the Third Circuit lacked subject matter jurisdiction, our request for retransfer, [also pursuant to 28 U.S.C. § 2112(a)], was denied.

After briefs and oral argument, in a one sentence order, the Third Circuit denied all challenges to EPA's action. Appendix A.

The State of West Virginia seeks review in the Supreme Court of substantial legal issues concerning the

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[1]The rationale document accompanying the proposed rulemaking is essential to the Court's review of this Petition and will be certified to this Court pursuant to Rule 19.1. This document, written by the chief technical advisor in the rulemaking on October 26, 1979 will be referred throughout this Petition as the "Belanger Memo."

Administrator's arbitrary actions, his dissimilar treatment of our State Implementation Plan from other States, the improper ursurpation of authority by the Administrator and the improper exercise of jurisdiction by the Third Circuit Court of Appeals concerning a rulemaking involving a State not within its geographical composition.

Statement of Facts

As we are sure this Court realizes the Clean Air Act has had major impact on the coal and electrical power industries throughout the Nation. Two power stations in West Virginia, the Harrison power station (owned by Monongahela Power Company) and the Mitchell power station (owned by Ohio Power) were required by state and federal regulation to drastically limit their emissions of sulfur dioxide (SO_2) by 1978.

During the pre-compliance period (1975-1978) it became obvious that the national ambient air quality standards (NAAQS) were being achieved without further required reduction in emissions and that the higher sulfur coal located in the northern portion of West Virginia was no longer in demand due to stringent

emission limits required to meet the primary NAAQS.

On July 12, 1976, the Governor of West Virginia issued an Executive Order requiring the West Virginia Air Pollution Control Commission (Commission) to adopt SO_2 emission limits at a level which would both meet the national ambient air quality standards (NAAQS) and protect the State's coal economy. The Executive Order correctly found that actual SO_2 ambient air levels in West Virginia were generally much cleaner than necessary to comply with the NAAQS. The Governor's directive required the Commission to use atmospheric dispersion models as the primary analytical means "for assuring that ambient sulfur dioxide standards will be achieved and that unnecessarily stringent limitations will thereby be avoided."

To this end, EPA and the Commission undertook air dispersion modelling.[2] EPA

[2] An air dispersion model is a computer construct used to predict an emission source's expected impact on air quality. Assumptions and variables "plugged" into the computer include data concerning hourly meterological conditions and power plant load factors. See State of Texas v. EPA, 499 F.2d 289, 301 (5th Cir. 1974) and Cleveland Electric Illuminating Co. v. EPA, 572 F.2d 1150 (6th Cir. 1975) for an explanation of mathematical models.

presented to the State results of a study which used six (6) years of meteorological data.[3] EPA officials testified at the State's rulemaking proceeding that emission limits for the Mitchell power station could be set at a 4.9% sulfur-in-coal level and that Harrison could be set at a 4.2% sulfur-in-coal level. These limits contrast with the 1978 limits of 1.25% sulfur-in-coal.

EPA, however, continued to model for two additional years of meteorological data. These additional predictions showed that in an "artificial" situation using "1974 emissions data in terms of fuel quality, an artificial operating load which the plant may never have actually experienced and 1976 meteorological data" (Belanger Memo, p. 5) that the 3 hour secondary NAAQS might be violated at a point only 1.5 km from each plant. EPA, exercising proper judgment and recognizing the State's primary role in setting its own emission limits, left the degree of confidence and safety factor for achieving the NAAQS to the State.

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[3] Modelling is usually conducted for only one year. See Belanger Memo, p. 6.

The State examined the modelling results and submitted emission limits lower than EPA's expressly stated approvable limits. Mitchell and Harrison were set at 4.2% and 3.7% respectively.

EPA, however, recognized that § 123 of the 1977 Clean Air Act Amendments contained a prohibition against "tall stacks". The Harrison emission limits therefore had to be recalculated using a fictitious stack height of 640 feet instead of its actual 1000 feet. Based on these new calculations, EPA informed the State that a 3.2% sulfur-in-coal limit was approvable and the Commission lowered its submitted emission limits for Harrison to that new level.

With full knowledge of the predicted violations, EPA approved these emission limitations as a part of the West Virginia State Implementation Plan on November 9, 1978. Appendix C. In doing so, EPA properly discounted the predicted violations because the mathematical model was based on conservative assumptions unreasonably strict in light of the large amount of meteorological data used and because the

predicted violation was based on "A" stability meteorological conditions.[4]

After such approval, the Commonwealth of Pennsylvania and several environmental groups sued EPA in the Third Circuit Court of Appeals. EPA requested a voluntary remand to reconsider the modelling data. The State of West Virginia intervened in the proceeding.

On remand, EPA modelled for yet another year of meteorogical data and proposed to reapprove the previously submitted emission limits. The rationale document accompanying this proposed reapproval consitutes an admission and explanation by the Agency of the reasons for reapproval. This document explains why retraction of EPA's approval is unreasonable, arbitrary and capricious. (Belanger Memo).

EPA found that use of nine (9) years of meteorological data ("more than EPA has

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[4] "A" stability is an extremely rare meteorological condition of short duration Rulemaking based on "A" stability without a study to confirm its existence, frequency and effect on pollution dispersion is arbitrary and capricious. Cincinnati Gas & Electric Co. v. EPA, 578 F.2d 660 (6th Cir. 1978) cert. denied 434 U.S. 1114 (1979).

ever used" Belanger Memo, p. 6) and the normal conservative modelling inputs more than justified approving the emission limits.

> "Our usual policy (of conservative inputs in the model which counterbalances the lack of meteorological data) does not take into account, however, the so far unique case in which there is a very ample record of meteorological data, extending over nine years when we are able to actually identify the rare, worst case of weather conditions -- roughly speaking, the meteorological equivalent of a hundred-year flood.
>
> "When we have ample meteorological data, and consider the worst case disclosed, our other conservative assumptions become unreasonably strict.
>
> "[In this case] we are beginning with an extremely rare event in meteorology, and then piling onto that, assumptions about rare events all of which take together amount to an impossibility or at least to an unreasonable improbability.
>
> "I think this argument would be self-evident * * *."

(Belanger Memo, pp. 8-9).

Thus EPA admits that the modelling performed was unreasonable and predicted an

impossible event or at least an event of unreasonable improbability.

EPA performed a statistical probability analysis to "supplement" its judgment. This statistical probability method factored in variability of the sulfur in coal fuel. The analysis predicted that there would be a violation of the secondary standard on the average of once in 28 years at Mitchell and once in 37 years at Harrison.

> "For either station, that is probably longer than the useful lifetime of the plants as base-load generating stations, and a longer time than we require any State to consider in planning air quality. See, for example, 40 CFR § 51.12 e, which requires planning for a 10-year period. (Other mechanisms are used to maintain the standards after that period.) In short, even under conservative assumptions about the model itself, we can predict with reasonable certainty that there will be no ambient air quality violations from either plant during their lifetimes. (Belanger Memo, p. 12).
>
> Finally, EPA concluded:
>
> "* * * I have examined the CRSTER printouts for both Mitchell and Harrison for this 1977 (ninth)

> model year and find that the concentrations predicted are substantially below those for 1976 and so there are no further predicted violations of the air quality standards based on this extra year or meteorology. The consequence of this is that a predicted violation at either of these plants could occur only once if that rare event which occurs during one three-hour period in nine years happens to coincide with the plants burning the highest sulfur percentage which they are allowed to burn and with a very large background in the case of the Mitchell plant. As was stated before, the analysis done at SAI incorporated indicates that the probability of this coincidence occurring is very low, and so far as we can determine is at least as low as the probability of violations resulting from assumptions that our usual modeling techniques guidance would approve.
>
> (Belanger Memo, p. 14).

But after this thorough analysis and careful justification which supported its proposed rule reapproving the limits (Appendix D), EPA reversed its position, withdrew its approval of the emission limits because they were not adequate to attain secondary NAAQS, and gave the State

nine months to either justify the limits or lower them. Appendix E.

The only reason EPA gave for its sudden change was that they had not yet approved the use of the statistical probability method. But since the Agency never relied on it for its first approval and had other reasons for upholding its decision, non-use of the statistical probability method is a straw man and not a valid reason for overturning its approval.

Indeed, the failure to use this method is somewhat peculiar since the purpose of determining statistical probability is to infuse some semblance of realism into the rulemaking. As EPA asserts, some kind of realism must be plugged into the decision and that failure to do so is arbitrary:

> "Any time we try to make predictions we are faced with uncertainities. These uncertainities apply whether we are attempting to forecast the cost of a building or the weather for tomorrow or whether or not there will be a violation of an air quality standard. Air pollution modelling is not a precise science, so it is always necessary to temper one's conclusion with a certain amount of judgment about the probabilities of an event occurring. (Emphasis supplied).

(Belanger Memo, p. 5).

Use of the statistical probability method is necessary in this case to avoid fantasyland rulemaking. EPA's rationale document stated:

> "Our conservative assumptions, in short were inconsistent with the uniquely ample record of meteorology before us.
>
> * * *
>
> "In the usual modelling analysis, we assume that the fuel burned is steadily and uniformly the highest sulfur content allowed. We know that this is physically impossible; if a power plant, for instance, is actually complying with the limits on maximum emissions, the natural variability of sulfur in fuel is such that most of the emissions will be below the maximum. We ordinarily make an unreasonable and conservative assumption about sulfur variation to counterbalance our lack of information about meteorology and other factors. When the conservative assumption is no longer needed, however, and the actual data about sulfur is available it is reasonable to abandon our usual assumption and consider the real data we have." (Emphasis supplied.) (Belanger Memo, p. 9).

Indeed, in a Notice of Inquiry, 45 Fed. Reg. 9994 (February 14, 1980), EPA had exempted from inquiry and alteration its West Virginia SIP approval because the

statistical analysis "was combined with an alternative set of more stringent [modelling] conditions in determining that a violation of ambient air quality standards was not expected." 44 Fed. Reg. 9996, Col. 2.

By rejecting the State's SIP, EPA has treated West Virginia differently than neighboring states such as Ohio. For example, EPA implicitly adopts the "A" stability meteorological conditions found unreasonable in the Sixth Circuit. In addition, the record contains documents from Region V personnel that if EPA's Region III adopted the Region V calculation of background then Mitchell power station would be predicted as attaining the secondary standard. Finally, EPA modelled for only one year of meteorological data in Ohio, but nine years in West Virginia! (Belanger Memo, p. 6).

ARGUMENT IN SUPPORT OF GRANTING WRIT OF CERTIORARI

Summary

The five issues presented for decision are vitally important and confusing questions of federal law which must be settled by the Supreme Court. The Third Circuit's judgment order (issued one day after oral

argument) implicitly decides many of these issues in conflict with decisions of other federal Courts of Appeal and this Court and exhibits the Third Circuit's reluctance to deal with complex and confusing technical questions. The questions presented raise generic issues common to all the states concerning federal air pollution control law, administrative rulemaking, the authority of respective sovereigns and federal appellate jurisdiction.

Because all of these issues affect the entire fifty states and the federal government, the national interest will be served by this Court deciding them. This Court should not allow additional unequal treatment of State Implementation Plans or continued conflicting appellate court decisions before clearing up an already nonsensical administrative process. This Court must also rule on questions of appellate jurisdiction to properly supervise the judiciary, uphold Congressional intent and ensure fairness to the litigants.

Jurisdictional Issues

By refusing our motion to retransfer the case to the Fourth Circuit for lack of subject matter jurisdiction, the Third Circuit ignored expressed Congressional principles reaffirmed by the First and District of Columbia Circuits. NRDC v. EPA, 465 F.2d 492 (1st Cir. 1972); NRDC v. EPA, 475 F.2d 968 (D.C. Cir. 1973). Congress intended that SIP's be reviewed in the circuit where the area is located. The Third Circuit has fostered jurisdictional confusion festering since the Clean Air Act Amendments first passed in 1970[5] and which will continue to grow in national importance over the next several years.

The instant case is really only a shot in the opening legal salvo of a brewing civil war over the "acid rain" controversy. The Commonwealth of Pennsylvania was objecting to the new SO_2 emissions because, they allege, SO_2 increases will exacerbate the acid rain problem. By

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[5] See e. g., District of Columbia v. Train, 533 F.2d 1250, 1252 (D. C. Cir. 1976).

filing its petition in the Third Circuit, Pennsylvania secured a convenient, familiar forum sensitive to her problems. As more States become increasingly litigious over acid rain and interstate air pollution,[6] they too can seek judicial review of other State's implementation plans in their own backyards - against the expressed Congressional desire and to the detrement of local review.[7]

By accepting jurisdiction, the Third Circuit obviously agreed with Pennsylvania that a state allegedly impacted by the air emissions could bring its review petition in its home circuit and not in the Circuit where with SIP is located.

The Clean Air Act grants geographically based subject matter jurisdiction dividing appellate review between the "appropriate" circuit for local and regional issues ver-

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[6] E. g., State of Connecticut v. EPA, 656 F.2d 902 (2nd Cir. 1981); State of New York v. U. S. EPA, D. C. Cir. No. 81-1183 (challenges to Michigan and Ohio SIPS); State of New York v. U. S. EPA, 7th Cir. No. 80-2808 (Indiana SIP).

[7] See Peabody Coal Co. v. EPA, 522 F.2d 1152, 1153 (8th Cir. 1975).

sus the District of Columbia Circuit for national issues. 42 U.S.C. § 7607(b)(1).

A State Implementation Plan is expressly designated as a local or regional issue in the statute, 42 U.S.C. § 7607(b)(1) to be heard exclusively in the Court which contains that State or air quality control region within its geographical composition

> "For review of the approval or promulgation of implementation plans which run only to one air quality control region, the section places jurisdiction in the U. S. Court of Appeals for the Circuit in which the affected air quality control region or portion thereof is located."

Senate Report No. 91-1196, 91 Cong., 2d Sess. 41 (1970). Cited in NRDC v. EPA, 465 F.2d 492, 494 (1st Cir. 1972).

The 1977 Clean Air Act Amendments[8] were supposed to clarify this legislative intent and to ensure that SIP reviews were conducted in the circuit where the area is located.

> "[The addition to the second sentence] provides for essentially locally, statewide or regionally applicable

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[8] Examined for a different and rare jurisdictional issue in Harrison v. PPG Industries, Inc., 446 U.S. 578 (1980).

> rules or orders to be reviewed in the U. S. Court of Appeals for the Circuit in which such locality, state or region is located. This provision applies, * * * to the Administrator's action in approving, promulgating an implementation plan for any state.

H.R Rep. No. 95-294, 95th Cong., 1st Sess., 323-324 (1977) reprinted in 1977 U.S. Code Congressional and Administrative News, 1402-1403.

Both the First and D. C. Circuits noted that the words "Appropriate Circuit" connotes a certain amount of flexibility. NRDC v. EPA, supra; NRDC v. EPA, supra.[9] More than one appropriate circuit can exist; but only when the EPA administrative action pertains to a geographical area in more than one circuit. NRDC v. EPA, 475 F.2d at 969-970. The instant rulemaking is specific to West Virginia's SIP and does not deal with an interstate air quality control region.

The judicial review provisions of 42 U.S.C. § 7607(b)(1) designating "appropriate" circuit is not a venue provision.

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[9]Both of these cases really dealt with the question of which court should hear national issues under 42 U.S.C. § 7607(b)(1) prior to amendment in 1977.

See e.g. Panhandle Eastern Pipeline Co. v. F.P.C., 324 U.S. 635 (1945). Jurisdiction and venue are creatures of congressional intent. Congress intended that EPA rulemaking concerning West Virginia's SIP should be heard in the Fourth Circuit.

Indeed, if "appropriate" circuit is a venue provision then many unintended results attach. For example, if the State of Maine sues EPA for approving Indiana's SIP, then the First Circuit could be the "appropriate" circuit rather than the Seventh Circuit. Congress did not intend such a result!

In addition, if "appropriate" circuit is a venue provision, then West Virginia will continually face venue battles since EPA's regional office is in Philadelphia and the Third Circuit can be considered more "convenient" than the Fourth Circuit - especially, for example, if the petitioner is a Philadelphia based corporation. Likewise, New Mexico could have its SIP reviewed in the Fifth Circuit instead of the Tenth Circuit since EPA's Regional Office is in Dallas, Texas. Ohio's SIP could be reviewable in the Seventh Cir-

cuit, since EPA's Regional Office is in Chicago rather than the Sixth Circuit where it belongs.

In a case similar to the instant situation the Eighth Circuit transferred its case to the Tenth Circuit.

> "[W]e cannot ignore the fact that the primary environmental effect of the Administrator's action in this case will not be felt in this circuit, but in Colorado. We assume that most of those interested in the state's permit program reside and transact business in Colorado. It therefore stands to reason that future litigation on this subject will more probably be in the Tenth Circuit than in any other. It is plain that inconsistent adjudications as to Colorado's program could result if we would hear this case, a result which federal courts must avoid whenever possible." Peabody Coal Co. v. EPA, 522 F.2d at 1153.

This Court must accept this writ to prevent forum shopping and wasted judicial time taken up deciding jurisdictional venue and transfer motions.

EPA'S REVERSAL WITHOUT REASON INSPITE OF CONTRARY OVERWHELMING EVIDENCE

In its final rulemaking action on November 9, 1978, EPA approved the

emission limits for Harrison and Mitchell power stations. After further examination EPA proposed to reapprove these emission limits and then, without adequate justification, reversed itself and refused to approve the same emission limits. EPA's unreasonable reversal flies in the face of overwhelming evidence and a Congressionally mandated duty to explain the reason "for major changes in the promulgated rule from the proposed rule." 42 U.S.C. § 7607(d)(6)(A).

Beside disregarding a legislative mandate EPA also flagrantly ignores principles of reasoned rulemaking enunciated in several Supreme Court decisions. E.g., Atchison, Topeka & S.F.R. Co. v. Wichita Board of Trade, 412 U.S. 800, 806, fn. 5 808 (1972); Secretary of Agriculture v. United States, 347 U.S. 645 (1945).

Indeed, as the Legislative history to 42 U.S.C. § 7607(d)(6)(A) points out:

> "A fourth alleged procedural shortcoming of the existing act is its failure to require the Administrator of EPA to state clearly the reasons for his action. This criticism was implicit in the Court's decision in Kennecott Copper Corp. v. EPA, 462 F.2d 846 (D. C,. Cir. 1972).

* * *

> Section 305 of the committee bill establishes a new subsection 307(d) of the act. This provision of the committee bill attempts to cure each of the problems which have been identified under the current act's approach to rulemaking.
>
> Administrative Decision.- In promulgating any rule referred to in this section, the Administrator must state the basis of purpose of the final rule, just as such a statement must accompany the proposed rule. The final rule must also be accompanied by an explanation of the reasons for any major changes from the proposed version and a response to the significant comments, criticisms and data submitted during the comment period. While these statements needs not be exhaustive or respond to every argument regardless of weight, they must be of sufficient depth and complexity to show that the Administrator did consider public comments, to provide basis for States to know how to revise plans so as to be approvable (in case of a disapproval), and to permit any court reviewing the rule under section 307(b) to be fairly apprised of the basis for the Adminstrator's action.

H.R. Rep. No. 95-294, 95th Cong., 1st Sess., 318, 319 and 321, reprinted in 1977 U. S. Code Congressional and Administrative News, 1397, 1398, 1400.

EPA has given the State nine months to either justify the emission limits or to lower them. Appendix E. Based on the

record, we have no idea of what factors could justify or convince EPA to accept the limits. How can we further convince EPA that the modelling was overly conservative and unreasonable when the record is replete with their own admissions?

As the sophistication and complexity of air quality modelling increases, courts will be more frequently called upon to examine EPA's justifications. See e.g., State of Texas v. EPA, 499 F.2d 289 (5th Cir. 1976); Cleveland Electric Illuminating Co. v. EPA, supra, fn. 2. Parties to the case postulated that EPA reversed its position because of the artificially predicted violation. But EPA is not required to reject a SIP based on predicted violations. Environmental Study and Protection v. P.A.C, 464 F.,Supp. 143 (D. Conn. 1978). EPA has not explained its "major change" in policy and the Third Circuit's refusal to closely examine substantial modelling and administrative rulemaking issues, in an area where EPA's authority is limited, Union Electric Co. v. EPA, 427 U.S. 246 (1976) encourages EPA to continue its pre-amendment policy of not explaining its decisions.

The instant case presents an example where EPA, after extensive modelling, accepted a self-proclaimed unreasonable result that the secondary NAAQS might be violated for a theoretical three-hour period, . Since air quality modelling is the method of choice for setting emission limits, review by this Court is necessary to curb an agency whose rulemaking borders on fantasy and to uphold Congressional intent on issues which affect each State and most major emission sources.

WHICH SOVEREIGN HAS PRIMARY RESPONSIBILITY

Perhaps an even more outlandish aspect of this case is EPA's intrusion into an area expressly reserved to the States. Section 107(a) of the Clean Air Act expressly provides that the States have primary responsibility for attaining and maintaining air quality. EPA's acceptance of the fantasy violation rejected a lawfully promulgated State regulation (based on hundreds of pages of testimony) which EPA adopted in a final rulemaking. Since the violation predicted is only 1.5 km from the source (solely within West Virginia) EPA's second-guessing of the

Commission's decision is even more egregious.

As this Court has decided favorably for the States, it is the States' responsibility to determine the best way to protect its citizens and to set the emission loads within the State. Union Electric Co. v. EPA, supra; Train v. NRDC, 421 U.S. 60 (1975).

This issue of sovereignty vitally affects the cooperative framework Congress established for implementation of the Clean Air Act. Indeed, EPA itself is apparently confused over its role since, in this case, it originally left the safety factor and degree of confidence of the model to the State.

This Court must rule on this issue to preserve the proper role of the sovereigns who share jurisdiction over the Nation's air.

EPA REGIONAL OFFICES MUST TREAT STATES SIMILARLY

In 1977 Congress recognized that EPA Regional Offices treated States differently and debated whether to restrict their authority. Congress continued allowing delegation of authority to the

Regions but only if the Administrator promulgated regulations to "assure fairness and uniformity in the criteria, procedures and policies applied by the various regions . . ." 42 U.S.C. § 7601.

> "The committee was also concerned about inconsistencies in procedures, policies, practices, and legal interpretations in EPA's regional offices. These problems are highlighted by the factual situation which is detailed in Montana Power Company v. EPA, CV-76-136BLD (D. Mont. 1977). * * *
>
> "Section 305(e) of the bill contains measures necessary for rational administration of a regional system. * * *
>
> "If the Agency chooses to continue to rely on this approach, it must do so subject to the following constraints. First, there must be reasonable uniformity in the criteria, procedures, and policies applied by the various regional offices under the act. Thus, use of different air quality models in different regions for the purpose of implementing the provision requiring prevention of significant deterioration would no longer be permitted."

1977 U.S. Code Congressional and Administrative News, pp. 1398, 1403.

Issues relating to modelling, of course, are much broader than the PSD issue discussed in Montana Power and Congress

intended uniformity in all areas of modelling.

The instant case is a glaring example of EPA's failure to heed Congressional mandates. EPA and the Third Circuit have both disregarded Cincinnati Gas & Electric Co. v. EPA, 578 F.2d 1150 (6th Cir. 1978); cert. denied 434 U.S. 1114 (1979) and treated West Virginia modelling differently than Ohio's by relying on "A" stability without justification. In addition, background concentrations were calculated in such a way that Mitchell power station would be attainment if EPA Region III had adopted the Region V calculation. Not only has EPA treated the States differently without justification, it has not heeded Congress' instruction to promulgate rules in such matters!

The Sixth Circuit and Third Circuit are in conflict. States and emission sources are getting unequal treatment in similar situations. This Court must rule on this

nationally important environmental issue.

CONCLUSION

For the above stated reasons, Petitioners respectfully request this Court to issue a Writ of Certiorari.

Respectfully submitted,

STATE OF WEST VIRGINIA,
EX REL. AIR POLLUTION
CONTROL COMMISSION

By Counsel

CHAUNCEY H. BROWNING
ATTORNEY GENERAL

NICHOLAS W. JOHNSON
DEPUTY ATTORNEY GENERAL
Counsel of Record

RONALD A. SHIPLEY
ASSISTANT ATTORNEY GENERAL

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

THE STATE OF WEST VIRGINIA, ex rel. WEST VIRGINIA AIR POLLUTION CONTROL COMMISSION,

Petitioner in No. 81-1343

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, DOUGLAS M. COSTLE, Administrator,

Respondent

MONONGAHELA POWER COMPANY and OHIO POWER COMPANY,

Intervenors

Petition for Review
Environmental Protection Agency

Argued
September 21, 1981
Before: ALDISERT, HIGGINBOTHAM and SLOVITER, Circuit Judges.

JUDGMENT ORDER

After considering the contentions of the petitioners, the intervenors and of

the United States Environmental Protection Agency, it is

ADJUDGED and ORDERED that the petition for review of the final order of the Environmental Protection Agency be and is hereby denied.

Costs taxed against petitioners.

BY THE COURT,

/Aldisert/
Circuit Judge

Attest:

/Sally Mrvos/, Clerk
Dated: September 22, 1981

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1343

THE STATE OF WEST VIRGINIA, EX REL. WEST VIRGINIA AIR POLLUTION CONTROL COMMISSION,

Petitioner,

v.

THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Douglas M. Costle, Administrator,

Respondent.

SUR PETITION FOR REHEARING

Present: Aldisert, Adams, Gibbons, Garth, Higginbotham, and Sloviter Circuit Judges.

The petition for rehearing was filed by the State of West Virginia, ex rel. West Virginia Air Pollution Control Commission, petitioner in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit

judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/A. Leon Higginbotham/
Circuit Judge

Dated: October 21, 1981

APPENDIX C

PART 52 - APPROVAL AND PROMULGATION
OF IMPLEMENTATION PLANS
43 Fed. Reg. 52239 (November 9, 1978)

West Virginia Implementation Plan;
Revision

AGENCY: Environmental Protection Agency.
ACTION: Final rule.
SUMMARY: This rule announces the Administrator's decision on the amended portion of regulation X of the West Virginia State Implementation Plan. The amendments provide for the relaxation of sulfur dioxide emission limitations at certain power plants, the deletion of the provisions related to secondary standards for all fuel burning units in the State, and a number of administrative changes. The Administrator is approving the portions of the amendments relating to the Fort Martin and Mitchell power plants and the deletion of the provisions related to the secondary standards for all fuel burning units in the State except the portion of §3.03(b) relating to the Rivesville facility. For the Rivesville facility the Administrator has determined that the existing emission limitation is inadequate to protect National Ambient Air Quality Standards and is calling for a revision for this part of the State implementation plan. Furthermore, the Administrator is delaying action on the portion related to the Kammer facility and approving an interim emission limitation for the Harrison power plant.

EFFECTIVE DATE: January 9, 1978

* * *

SUPPLEMENTARY INFORMATION:

Background

On January 25, 1978, the Governor of West Virginia submitted to EPA, region III a revision of regulation X (1973) for the control of sulfur dioxide. In his letter, Governor Rockefeller advised that the revision of regulation X had been adopted by the West Virginia Air Pollution Control Commission on December 19, 1977, and approved by the West Virginia Legislature on February 11, 1978. Further, the Governor asked that EPA consider the revision of regulation X as a change of the existing State Implementation Plan (SIP).

The revision primarily concerns section 3 of regulation X, wherein emission limits for electric power generating plants are set forth. These emission limits are intended to protect both the national primary and secondary standards for sulfur dioxide. The new emission limits proposed by West Virginia constitute a relaxation of existing limits. West Virginia's request represents the third proposed modification of regulation X since it was first approved by EPA in 1972.

The first change occurred in 1973 when the State deleted its own secondary standard for sulfur dioxide which was more stringent than the Federal secondary standard.

The second change was adopted by West Virginia on November 4, 1976, and submitted on November 10, 1976, to EPA as a proposed revision of the West Virginia State Implementation Plan. These 1976 revisions constituted a relaxation of emission limits for certain major power generating stations including the Mitchell

and Kammer Plants of Ohio Power Co., the Willow Island station of the Monongahela Power Co. and the John Amos plant of the Appalachian Power Co. In addition, the State proposed a deletion of §§ 3.01(b) and 3.03(b) which pertain to emission limitations intended to protect the national secondary standard for sulfur dioxide. These changes reflected the "moratorium" on all sulfur oxide controls deemed to be more stringent than needed to protect air quality standards as declared by the Governor of West Virginia in April, 1976, in an Executive order. The order resulted out of the Governor's concern for West Virginia's coal economy and parity between West Virginia and Ohio in the enforcement of regulations to control sulfur dioxide. However, the State had not submitted a certification of public hearing and had not adequately demonstrated that air quality standards would be attained and maintained as a result of the changed as required by Federal law. Consequently, the State, on advice of EPA region III, announced its withdrawal of the proposed revision submitted in 1976 and its replacement by the submittal of January 25, 1978.

The most recent proposal primarily concerns the emission limitations of sulfur dioxide as they apply to the Kammer, Mitchell, Fort Martin, and Harrison power plants. The emission limits proposed by West Virginia constitute a relaxation of existing emission limits related to the primary standard. Furthermore, unlike the 1976 revisions, these new changes for the above four power plants, with the exception of deletions of §§ 3.01(b) and 3.03(b), are based on the results of an extensive modeling study performed by the EPA in cooperation with the West Virginia

Air Pollution Control Commission. The deletion of §§ 3.01(b) and 3.03(b) is based on an additional study performed by the State. As discussed earlier, these sections are intended to protect the national secondary standard for sulfur dioxide and were effective on June 30, 1978, according to the federally approved regulation X. Finally, the proposed revision includes changes to certain requirements for emission data reporting and operating conditions.

On June 23, 1978, (43 FR 27208), the Regional Administrator proposed several actions on the amendments to regulation X submitted by the State of West Virginia as a requested revision of the West Virginia State Implementation Plan and provided for a 30-day comment period ending July 23, 1978. The Regional Administrator proposed that the portions of the regulation relating to the Fort Martin and Mitchell power plants and the deletion of §§ 3.01(b) and 3.03(b) concerning the protection of the secondary standard for sulfur dioxide be approved. * * * Finally, for the Harrison power plant of Monongahela Power Co., the Regional Administrator invited the state to submit to EPA an interim emission limitation of 5.12 lbs. $SO_2/10^6$ Btu, approximately a 3.2 percent sulfur-in-fuel requirement, based on an estimated "good engineering practice" stack height which would apply for a short period such as one year or until final promulgation of the section 123 regulation, whichever is the shorter period of time.

On September 13, 1978, the Governor of West Virginia submitted to EPA at the invitation of the Regional Administrator (June 23, 1976, 43 FR 27208), an interim emission limitation of 5.12 lbs $SO_2/10^6$

Btu, approximately 3.2 percent sulfur-in-fuel, for the Harrison facility of Monongahela Power Co. * * *

FINAL ACTION

The Administrator has reviewed the comments submitted during the public comment period and is today finalizing the action proposed by the Regional Administrator on June 23, 1978, 43 FR 27208.

The Administrator is approving the portion of the revision to regulation X relating to the Fort Martin and Mitchell Power Plants. The basis for his approval is the modeling study performed by EPA which demonstrated adequate protection of the National Ambient Air Quality Standards for Sulfur Dioxide.

* * *

For the portion of the revision relating to the Harrison power plant, the Administrator approves the interim emission limitation as submitted by the Governor on September 13, 1978. The emission limitation of 5.12 lbs $SO_2/10^6$ Btu will remain in effect for a period of 1 year or until such time as the final regulations for section 123 are finalized, whichever is the shorter period of time. After the section 123 regulations are finalized, West Virginia will apply them and determine whether a different emission limitation is authorized for Harrison. Upon making this determination, West Virginia will submit an emission limitation to the EPA for review and public comment as a proposed SIP revision. If the section 123 regulations are not finalized in a timely manner, or if West Virginia does not submit a proposed SIP revision to EPA by a date sufficient to allow review, public comment, and final action before the end

of the one-year period, EPA will require West Virginia to amend its SIP to provide an emission to be effective after the one-year period.

* * *

Finally, the Administrator approved all administrative changed of regulation X.

Dated: October 31, 1978

(Authority: 42 U.S.C. 7410 and 7601)

DOUGLAS M. COSTLE
Administrator

Part 52 of title 40, Code of Federal Regulations is amended as follows:

Subpart XX - West Virginia

1. The section 52.2520, paragraph (c)(9), is added as follows:

§ 52.2520. Identification of plan.

(c) The plan revisions listed below were submitted on the date specified * * *

(9) Amendments to regulation X (to prevent and control air pollution from the emission of sulfur oxides) §§ 2.07 (added), 2.08 (former section 2.07), 2.09 (added), 3.01(a), 3.02, 3.03(a) (sections 3.01(b) and 3.03(b) are deleted), 3.05, 3.06 through 3.08 (added), 5.01, 6.01, 10 (added) and 11 (former section 10) of the West Virginia Administrative Regulations; submitted on January 25, 1978 (as amended September 13, 1978), by the Governor.

2. In § 52.2522, subsection (b) is added as follows:

§ 52.2522. Approval status.

(a) * * *

(b) The Administrator approves the deletion of the provisions found in § 3.03(b) of regulation X except as it applies to the Rivesville plant, Monongahela Power Co.

3. Section 52.2525 is added as follows:

§ 52.2525. Control Strategy; Sulfur dioxide.

(a) The provisions of § 51.13(e) are not met because the State did not adequately demonstrate that the deletion of §3.03(b) of West Virginia regulation X as it applies to the Rivesville plant would not interfere with attainment and maintenance of the national ambient air quality standard.

[FR Doc. 78-31604 Filed 11-8-78; 8:45 a.m.]

APPENDIX D

ENVIRONMENTAL PROTECTION AGENCY
40 CFR Part 52
44 Fed. Reg. 64439 (November 7, 1979)
[FRL 1352-7]

Proposed Revision of the West Virginia State Implementation Plan

AGENCY: Environmental Protection Agency.
ACTION: Proposed rule.

SUMMARY: On November 9, 1978, the Administrator approved as a revision of the West Virginia State Implementation Plan (SIP), amendments to the Commonwealth's Regulation X dealing with sulfur dioxide (SO_2) emissions from electric power generating plants, in response to petitions for review to the Third Circuit Court of Appeals. EPA has reconsidered the air quality impact of the revised emission limits for two power stations affected by the amendments. On the basis of its reconsideration, EPA now proposes to approve the revision.

DATE: Comments must be submitted on or before December 7, 1979.

FOR FURTHER INFORMATION CONTACT: Mr. William Belanger (3AH13), Air Programs Branch, U.S. Environmental Protection Agency, Region III, Curtis Building, 10th Floor, 6th and Walnut Streets, Philadelphia, PA 19106; phone (215) 597-8188.

SUPPLEMENTARY INFORMATION: On November 9, 1978, (43 FR 52239) the Administrator approved as a revision to the West Virginia SIP, amendments to the Commonwealth Regulation X, which deals with sulfur dioxide

emissions from electric power plants. Among other actions, the revisions would allow increases in emissions from the Harrison and Mitchell generating stations. The approval was based on the determination by EPA that the relaxation of emission limitations would not interfere with attainment or maintenance of the National Ambient Air Quality Standard for sulfur dioxide. This determination was based on air pollution modeling conducted by EPA. This modeling incorporated an analysis of the Harrison plant based on a "Good Engineering Practice" stack height as mandated by Section 123 of the Clean Air Act, but he approval of the limitation for the Harrison plant was for a period of one year, or until EPA promulgated final regulations implementing Section 123, whichever came first.

On January 3, 1979 and January 5, 1979, the Commonwealth of Pennsylvania and the Council of Senior West Virginians, et al., filed in the U.S. Court of Appeals for the Third Circuit petitions for review of EPA's final rulemaking action of November 9, 1978. On July 9, 1978, EPA requested the Court remand to the agency two issues raised by the petitioners. EPA sought to reconsider the air quality impact of the revised emission limitations for the Harrison and Mitchell stations in light of all meteorological data available, and to consider the impact of Harrison on the Prevention of Significant Deterioration (PSD) increments. The Court granted EPA's motion on July 10, 1979, and stayed further action pending EPA's reassessment of its earlier action. EPA agreed to propose a rule governing these power stations by October 8, 1979. Due to difficulties in completing its analysis, EPA requested and received from the court

an extension to November 7, 1979. In addition, West Virginia asked EPA to propose a permanent emission limit for the Harrison station as final regulations under Section 123 have not been issued.

EPA has conducted new modeling for the Harrison and Mitchell plants. The modeling was conducted utilizing the CRSTER Model for areas within 50 kilometers of the plants and two independent approaches for the Class 1 PSD areas which are more distance. A formal statistical analysis was performed to account for fuel variability as a means of realistically evaluating the impact of the plant in light of the uniquely extensive record of meteorological conditions during nine years. The results of the modeling shows no expected violations of any of the SO_2 air quality standards during the useful life of the plants. The modeling also shows that the Harrison plant will consume less than the available PSD increment. Modeling was also performed for receptors within the Commonwealth of Pennsylvania and it was found that emissions from the plants will not prevent attainment of the SO_2 standards in Pennsylvania. All modeling for the Harrison station assumed good engineering practice stack height, and EPA proposes to make the proposed Regulation X amendments permanent.

This notice is to announce the results of the new modeling, and to provide a 30-day comment period before it is decided whether to approve the earlier revisions to Regulation X (previously approved November 9, 1978) concerning the Mitchell and Harrison power stations as a revision to the West Virginia State Implementation Plan. Therefore, the public is invited to submit to the address stated

above, comments on whether to approve this proposed rule as a revision of the West Virginia State Implementation Plan.

The Administrator's decision to approve or disapprove the proposed revision will be based on whether the amendments meet the requirements of section 110(a)(2) of the Clean Air Act and 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans.

Under Executive Order 12044, EPA is required to judge whether a regulation is "significant" and therefore subject to the procedural requirements of the order or whether it may follow other specialized development procedures. EPA labels these and other regulations as "specialized". I have reviewed this regulation and determined that it is a specialized regulation not subject to the procedural requirements of Executive Order 12044.

[42 U.S.C. 7401-7642]

Dated: October 29, 1979

Alvin R. Morris,
Acting Regional Administrator

[FR Doc. 79-34447 Filed 11-6-79; 8:45 a.m.]

APPENDIX E

[A-3-FRL 1662-3]

44 Fed. Reg. 74478 (November 10, 1980)

Approval of Revision of the State of West Virginia Implementation Plan

AGENCY: Environmental Protection Agency.
ACTION: Final Rule.

SUMMARY: On November 9, 1978, (43 FR 52239) the Administrator approved as a revision to the West Virginia State Implementation Plan (SIP), amendments to the State's Regulation X dealing with sulfur dioxide (SO_2) emissions from electric power generating plants. In response to petitions for review in the United States Court of Appeals for the Third Circuit, EPA reconsidered the air quality impacts of the revised emission limitations for two of the power stations affected by the revisions. On November 7, 1979, [44 FR 64439] on the basis of its reconsideration, EPA proposed to approve again the emission limitations for the two power plants as adequate to ensure attainment and maintenance of the primary national ambient air quality standard for SO_2. EPA has determined, however, that these limitations are not adequate to ensure attainment and maintenance of the secondary national ambient air quality standard for SO_2. In a separate notice published elsewhere in today's Federal Register, EPA is informing the State of this plan deficiency and requiring the

State within nine months to submit a control strategy that demonstrates attainment and maintenance of the secondary SO_2 standard.

EFFECTIVE DATE: December 10, 1980.

* * *

FOR FURTHER INFORMATION CONTACT:
Mr. William Belanger, Air Programs Branch (3AH13), U.S. Environmental Protection Agency, Region III, Curtis Building, 6th and Walnut Streets, Philadelphia, PA 19106, telephone (215) 597-8188.

SUPPLEMENTARY INFORMATION:

I. Background

West Virginia amended its Air Pollution Control Commission Regulation X, sulfur dioxide (SO_2) emission controls for power plants, and[2] submitted the amended regulation to EPA in January, 1978; further amendments were submitted during the course of the year. EPA approved most of the changes, 43 FR 52239 (November 9, 1978). In January, 1979, the Commonwealth of Pennsylvania and six citizens' organizations petitioned the United States Court of Appeals for the Third Circuit to review EPA's approval so far as it applied to the Mitchell and Harrison power stations. In response to these petitions, EPA reviewed the record of its action and at EPA's request the Court remanded two issues to EPA for reconsideration; dispersion modelling of the air quality impact of emissions from the two power stations, and an analysis of the impact of the Harrison station emissions on maximum allowable increases ("increments") under EPA's regulations for the prevention of significant degradation of air quality

("PSD"). The Court allowed the revisions to remain in effect while EPA reviewed these two issues.

The SO_2 emission limit for the Harrison station was an interim limit effective until November 8, 1979, or until EPA promulgated final regulations concerning credit for tall smokestacks, whichever occurred first. 42 U.S.C. 7423. As EPA has not promulgated such regulations, the interim Harrison limitation would have expired during the remand period; EPA therefore extended Harrison's interim emission limit until such time as EPA adopts a permanent limit. 45 FR 39253 (June 10, 1980).

On November 7, 1979, EPA proposed to reapprove the Regulation X amendments remanded to it for reconsideration. On the basis of its review and consideration of comments submitted to it, EPA today takes final action to approve those amendments as a revision of West Virginia's SIP for attainment and maintenance of the primary national ambient air quality standards ("NAAQS") for SO_2.

EPA's review found, however, that West Virginia's control strategy does not demonstrate attainment and maintenance of the secondary SO_2 standard. Dispersion modelling using the CRSTER model with the most recent five years of meteorological data predicted a violation of the three--hour secondary SO_2 standard under meteorological conditions which occurred in one of those years. As a result, the State's control strategy is not adequate to ensure attainment of the secondary SO_2 standard. In a separate notice in today's Federal Register, EPA is informing the State of this deficiency. EPA is also calling on the State to submit within nine months either a revision of its control

strategy or a demonstration that the current control strategy is adequate to protect the secondary SO_2 standard. If the State determines that additional emission limitations are needed to protect the secondary SO_2 NAAQS, the State must also prescribe a schedule for compliance with the new limits within a reasonable time.

Section 110(a)(2)(A) of the Clean Air Act and EPA regulations require that a compliance schedule provide for attainment of the secondary standard within a reasonable period of time. EPA regulations provide that a state may consider social, economic and technological factors in determining a reasonable schedule for attainment of secondary standards. 40 CFR 51.13 (b)(1979).

EPA is aware that the State and the representatives of the utility owners, coal companies and coal mines have alleged that severe social and economic disruption will occur if the power stations are required to reduce their emissions below the levels approved today as adequate for primary standard attainment. The agency recognizes that some methods of attaining the secondary SO_2 standard, such as switches to low sulfur coal, could result in localized job losses in the coal mining industry and related businesses. If the State determines that additional emission limitations are necessary to demonstrate attainment of the secondary SO_2 standard, EPA encourages the State to take into account potential adverse employment effects when establishing a compliance schedule to carry out any necessary secondary SO_2 standard control strategy, and to consider control strategies and compliance schedules that will avoid or minimize social and economic disruption. If desired by

the State, EPA personnel will work with the State to develop approaches that ensure secondary SO_2 standard attainment within a reasonable time while minimizing any adverse employment impacts.

II. Control Strategy Demonstration

In its November 7, 1979, notice proposing approval of this revision, EPA noted that its original action and proposed reapproval were based on its conclusion that the one modelled violation of the secondary SO_2 standard was so unlikely to occur that the violation should not be used as a base for establishing emission limitations for the power plants. EPA's evaluation of the probability of the violation was based on a statistical analysis that related worst case meteorology to sulfur variability in coal and calculated the likelihood that worst-case meteorology would coincide with worst-case sulfur content.

EPA has since concluded that the use of such statistical techniques should be evaluated for general Agency use and subject to public comment before being used by the Agency to analyze SIP revisions. Since the Agency has not yet completed review of statistical methodologies for general use, it has determined that it would be inappropriate to approve the instant revision based on a statistical analysis. Under the Agency's current policy and modelling guidelines, the State's control strategy does not demonstrate attainment and maintenance of the secondary SO_2 standard.

* * *

VI. Final Action

The Administrator approves the above--described amendments of West Virginia's Air Pollution Control Commission Regulation X as a revision to the State's Implementation Plan to attain and maintain the primary national ambient air quality standard for sulfur dioxide.

Under Section 307(b)(1) of the Clean Air Act, judicial review of this action is available only by the filing of a petition for review in the United States Court of Appeals for the appropriate circuit within 60 days of today. Under Section 307(b)(2) of the Clean Air Act, the requirements which are the subject of today's notice may not be challenged in civil or criminal proceedings to enforce these requirements.

The Administrator has reviewed this regulation and determined that it is a specialized regulation not subject to procedural requirements for significant regulations under Executive Order 12044.

(42 U.S.C. 7401-642)

Dated: October 31, 1980.

Douglas M. Costle,
Administrator

Note: - Incorporation by reference of the West Virginia State Implementation Plan was approved by the Director of the Federal Register on July 1, 1980.

Part 52 of Title 40, Code of Federal Regulations is amended as follows:

Subpart XX - West Virginia

1. Section 52.2520, paragraph (c)(3), is added as follows:

§ 52.2520 Identification of plan.

* * *

(c) The plan revisions listed below were submitted on the dates specified.

* * *

(3) Amended Sections 3.01(2) and 3.03(1) of Regulation X (to prevent and control air pollution from the emission of sulfur oxides), submitted on January 25, 1978 and amended September 13, 1978 by the Governor.

2. Section 52.2522 Approval status.

* * *

(e) The Administrator approves the amended Sections 3.01(2) and 3.03(1) of West Virginia Air Pollution Control Commission Regulation X submitted January 25, 1978 and amended September 13, 1978, as a plan for attainment of the primary SO_2 NAAQS. The Administrator does not approve the State's control strategy for attainment and maintenance of the secondary SO_2 NAAQS submitted on those dates, so far as it applies to the Mitchell and Harrison power stations.

[FR Doc. 80 - 35060 Filed 11-7-80; 8:45 a.m.]

Opposition

1

Office - Supreme Court, U.S.
FILED
FEB 19 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1361

In the Supreme Court of the United States

October Term, 1981

STATE OF WEST VIRGINIA, ex rel. AIR POLLUTION CONTROL COMMISSION,
Petitioner-Appellant

v.

ANN GORSUCH, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent-Appellee

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT, COMMONWEALTH OF PENNSYLVANIA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does the U.S. Court of Appeals for the Third Circuit have jurisdiction to review a final action of the Administrator of the U.S. Environmental Protection Agency revising the West Virginia state implementation plan under the Clean Air Act, 42 U.S.C. §7607 (b) (1), where the Act states that the action may be reviewed in the "appropriate circuit"?

ADDITIONAL PARTIES TO CASE BELOW

A. Appalachian Power Company

B. Council of Senior West Virginians

C. Group Against Smog and Pollution, Inc.

D. Monongahela Power Company

E. Monongahela County Citizens for Clean Air

F. Mountain Community Union

G. Ohio Power Company

H. State of West Virginia

I. West Virginia Citizens Action Group, Inc.

J. West Virginia Highlands Conservancy, Inc.

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MISCELLANEOUS:

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OPINIONS BELOW

The Judgment Order of the United States Court of Appeals for the Third Circuit, dated September 22, 1981, did not contain an official court opinion. The text of that order is reprinted in the Petition for Writ of Certiorari at Appendix A.

JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third Circuit was entered on September 22, 1981. The State of West Virginia filed a petition for rehearing, which was denied on October 21, 1981.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1), by the Petition for Writ of Certiorari filed by the State of West Virginia. The Commonwealth of Pennsylvania received the Petition for Writ of Certiorari on January 20, 1982.

The jurisdiction of the United States Court of Appeals for the Third Circuit, below, was invoked to review a final action of the U.S. Environmental Protection Agency by the timely filing of petitions for review under Section 307(b) of the Clean Air Act, 42 U.S.C. §7607(b).

STATUTORY AND CONSTITUTIONAL PROVISION INVOLVED

Section 307 (b) (1) of the Clean Air Act, 42 U.S.C. §7607 (b) (1), provides:

> GENERAL PROVISIONS RELATING TO ADMINISTRATIVE PROCEEDINGS AND JUDICIAL REVIEW
>
> * * *
>
> 307 (b) (1) . . . A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111 (d), any order under section 111 (j), under section 112 (c), under section 113 (d), under section 119, or under section 120, or his action under section 119 (c) (2) (A), (B), or (C) (as in effect before the date of enactment of the Clean Air Act Amendments of 1977) or under regulations thereunder, or any other final action of the Administrator under this Act (including any denial or disapproval by the Administrator under title I) which is local or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the proceeding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for

review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

* * *

STATEMENT OF THE CASE

This case commenced when the Commonwealth of Pennsylvania and the Council of Senior West Virginians, Inc. et al. filed separate petitions for review of a U.S. Environmental Protection Agency ("EPA") action approving revisions to the West Virginia state implementation plan. These petitions to review were filed on January 5, 1979, before the U.S. Court of Appeals for the Third Circuit. These two petitions were consolidated by the Court into a single proceeding.

The State of West Virginia requested leave to intervene, and was granted status as an intervenor on August 24, 1979. West Virginia did not raise any question of jurisdiction of the Third Circuit to decide the matters before it at that time or at any time prior to the filing of its final brief on January 30, 1981. Various motions were heard and decided by the Third Circuit in the intervening period.

EPA requested a voluntary remand in the case to review certain matters. The Third Circuit granted its motion. On November 10, 1980, EPA repromulgated its final action on the West Virginia state implementation plan. 45 Fed. Reg. 74478 (Appendix E of Petitioner's Writ for Certiorari). To insure the Third Circuit's continuing review of the November 10 action, the Commonwealth of Pennsylvania filed another petition for review on December 1, 1980 in the Third Circuit. West Virginia's petition for review of the same November 10 action was not lodged in the Fourth Circuit until December 29, 1980.

The U.S. Court of Appeals for the Fourth Circuit transferred West Virginia's petition for review to the Third Circuit, where it was decided on September 22, 1981. West Virginia now claims that the Third Circuit had no jurisdiction to decide the matter.

ARGUMENT

THE THIRD CIRCUIT WAS THE APPROPRIATE CIRCUIT TO REVIEW THE EPA ACTION

West Virginia's position is based on a fundamental misconception of the difference between jurisdiction and venue. West Virginia is actually complaining about venue rather than jurisdiction, and the relevant law concerning venue in appellate courts strongly supports the appropriateness of a decision on the merits by the U.S. Court of Appeals for the Third Circuit.

I. This Issue of the "Appropriate Circuit" Is a Venue Issue

Section 307 (b) (1) of the Act, 42 U.S.C. §7607, provides that a petition for review of any state implementation plan or plan revision by EPA which is "locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit."

The legislative history of the Clean Air Act makes it plain that the appropriateness of any particular circuit to decide a case is merely a question of venue. The House Committee observed in drafting the language that it was relying on recommendations of the Administrative Conference of the United States dealing with venue. H.R. Rep. No. 294, 95th Cong., 1st Sess. 324 (1977). Under certain circumstances, the report added, "exclusive venue" is only in the D.C. Circuit. The U.S. Supreme Court has also char-

acterized the demarcation of the D.C. Circuit and the other federal circuits in Section 307(b) as a venue question. *Harrison v. PPG Industries,* 446 U.S. 578 (1980).

When a statute such as this one invests all federal courts of appeal with the power to review orders or rules of an administrative agency, an objection to review by a particular appellate court is one of venue rather than jurisdiction. *Panhandle Eastern Pipe Line Co. v. Federal Power Commission,* 324 U.S. 635, 638-39 (1945); *Federal Power Commission v. Texaco,* 377 U.S. 635, 638-39 (1964).

II. Venue Is Appropriate in the Third Circuit

The language of the Clean Air Act, the legislative history and the existing case law interpreting Section 307 of the Act all demonstrate that venue in the Third Circuit is appropriate for this case. The House Report explains that the Act:

> provides for essentially locally, statewide, or regionally applicable rules or orders to be reviewed in the U.S. court of appeals in which such locality, State, or region is located.

H.R. Rep. No. 294, at 323. As the District of Columbia Court of Appeals concluded, interpreting almost identical language in the 1970 Clean Air Act:

> [B]y the phrase 'the appropriate circuit' Congress did not intend that all suits involving approval of state implementation plans be brought in the judicial circuit where the state is located. Instead, Congress intended to adopt a flexible approach to determine which circuit is appropriate. . . .

Natural Resources Defense Council v. Environmental Protection Agency, 475 F.2d 968, 969 (D.C. Cir. 1973). The D.C. Circuit drew its conclusion for two reasons. First, unlike other provisions in the 1970 Act, which provided judicial review of certain actions in the court of appeals for the circuit including the state, Section 307 (b) (1) refers more broadly to the "appropriate circuit." In *Dayton Power and Light Co. v. Environmental Protection Agency,* 520 F.2d 703, 707 (6th Cir. 1975), the Court noted:

> By the phrase 'the appropriate circuit' Congress did not intend that all suits involving approval of state implementations plans be brought in the judicial circuit where the state is located. 520 F.2d at 707.

Second, EPA decisions concerning metropolitan air quality control regions such as the District of Columbia affect more than one circuit (i.e., the D.C. and Fourth Circuits). Plainly, the court concluded, Congress did not intend review of air quality plans for that metropolitan area to occur in both circuits. *Natural Resources Defense Council v. Environmental Protection Agency, supra,* 745 F.2d at 969.

Contrary to West Virginia's argument, then, the Third Circuit may decide this case even though that state is not included within the boundaries of the Third Circuit. As long as the issue is of regional significance, venue is appropriate in any circuit containing part of that region. Since there has been dispute throughout this litigation concerning the air quality impacts of the West Virginia plants in Pennsylvania, the Third Circuit is an appropriate forum.

Venue is appropriate in the Third Circuit in this case because the Third Circuit includes the locale where the emissions from West Virginia impact, includes the state of

two of the Petitioners below (the Commonwealth and The Group Against Smog and Pollution), and includes the EPA Regional Office where the decisions were made and where the rulemaking record is lodged.

III. The First Petition for Review of EPA's Action in This Matter Was Filed in the Third Circuit

Where more than one circuit is available for judicial review of an agency action, and petitions have been filed in more than one circuit, the circuit in which the petition was first filed has venue. 28 U.S.C. §2112(a). The purpose of §2112(a) is to save time and expense, to facilitate review of agency decisions, and to save the time of the appellate courts. *BASF Wyandotte Corp. v. Costle,* 582 F.2d 108 (1st Cir. 1978). The "first-in-time" rule can be applied mechanically to avoid confusion and duplication by the courts.

In this case, petitions for review were filed in the Third Circuit long before any were filed in the Fourth Circuit. On January 5, 1979 the Commonwealth of Pennsylvania filed a petition for review in the Third Circuit of EPA's November 9, 1978 action.

After EPA promulgated another final action on November 10, 1980, the Commonwealth of Pennsylvania filed another petition for review before the Third Circuit on December 1, 1980. West Virginia's petition for review of the same action in the Fourth Circuit was not filed until December 29, 1980. Since petitions were filed in the Third Circuit long before any petition was filed in the Fourth Circuit by the State of West Virginia, the Third Circuit was the appropriate forum for a decision on the merits.

IV. West Virginia Had Alleged No Compelling Reason To Transfer This Case to Another Circuit

Although §2112(a) does permit an appellate court to transfer a case to another circuit "for the convenience of the parties in the interest of justice," notwithstanding the first-in-time rule, transfers should be granted only for compelling reasons. *BASF Wyandotte Corp. v. Costle,* 582 F.2d 108 (1st Cir. 1978). It is significant, in this regard, that West Virginia provided no arguments below concerning the convenience of the Fourth Circuit as a forum. On the contrary, there were substantial reasons of convenience for retaining jurisdiction in the Third Circuit.

CONCLUSION

The grant of jurisdiction to the U.S. Courts of Appeals under 42 U.S.C. §7607 (b) (1) to review actions of the U.S. Environmental Protection Agency provides discretion to the courts in the exercise of jurisdiction. The U.S. Court of Appeals for the Third Circuit properly concluded that it had jurisdiction and venue to decide the petitions for review. Accordingly, the Petition for Writ of Certiorari filed by the State of West Virginia should be denied.

Respectfully submitted,
FOR THE COMMONWEALTH
OF PENNSYLVANIA, DEPARTMENT
OF ENVIRONMENTAL RESOURCES

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Opposition

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No. 81-1361

In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF WEST VIRGINIA, EX REL.
AIR POLLUTION CONTROL COMMISSION, PETITIONER

v.

ANNE GORSUCH, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Third Circuit is an "appropriate circuit", within the meaning of Section 307(b)(1) of the Clean Air Act, to review action of the Administrator concerning revisions of the West Virginia State Implementation Plan, where the principal issue raised is the effect of the revisions on air quality in Pennsylvania.

2. Whether the Administrator's disapproval of one aspect of the proposed revisions because of the failure to demonstrate that the national secondary ambient air quality standard would be attained and maintained was arbitrary and capricious.

3. Whether the Administrator's explanation of his decision to disapprove a portion of the proposed revisions was adequate.

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In the Supreme Court of the United States

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STATE OF WEST VIRGINIA, EX REL.
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ANNE GORSUCH, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. 37-38) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1981 (Pet. App. 37-38). A timely petition for rehearing was denied on October 21, 1981 (Pet. App. 39-40). The petition for a writ of certiorari was filed on January 18, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Sections 107, 110(a)(2) and 307(b) of the Clean Air Act, 42 U.S.C. (Supp. III) 7407, 7410(a)(2) and 7607(b) are set out at Pet. 3-9.

STATEMENT

1. Under the Clean Air Act, the states are encouraged to develop programs to assure attainment and maintenance of both primary and secondary national ambient air quality standards; the Environmental Protection Agency is directed to assure that such programs meet the relevant requirements of the Act. See *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976); *Train* v. *Natural Resources Defense Council*, 421 U.S. 60 (1975). While the states have primary responsibility for fashioning plans to meet the federal goals under Section 107(a), 42 U.S.C. (Supp. III) 7407(a), EPA reviews each state plan or plan revision to assure that it meets the criteria set forth in Section 110(a)(2), 42 U.S.C. (Supp. III) 7410(a)(2), and that certain other requirements of the Act are met. See, *e.g.*, Section 165, 42 U.S.C. (Supp. III) 7475.

The basic requirement is that the plan provide for attainment and maintenance of national primary and secondary ambient air quality standards. Section 110(a)(2)(A), 42 U.S.C. (Supp. III) 7410(a)(2)(A). Another important criterion is that air pollution emissions in one state not interfere with attainment and maintenance of national standards in other states. Section 110(a)(2)(E), 42 U.S.C. (Supp. III) 7410(a)(2)(E).

EPA has established national primary and secondary ambient air quality standards for sulfur dioxide. 40 C.F.R. 50.4 and 50.5. Under the Act, the states must provide for attainment of the national primary

standard by December 31, 1982 and for attainment of the national secondary standard within a "reasonable time." Sections 110(a)(2)(A), 172, 42 U.S.C. (Supp. III) 7410(a)(2)(A), 7502.

2. The computer air quality dispersion model is the principal means of analysis used to determine whether emissions from a single air pollution source or a group of sources will cause or contribute to a violation of national ambient air quality standards or will interfere with the prevention of significant deterioration (PSD) in a clean air area.[1] See C.A. App. 1461.[2] Dispersion models are mathematical equations used to calculate expected ambient concentrations caused by pollution source emissions. Using actual data, such as a plant's fuel characteristics and meteorological measurements, the model predicts ambient concentrations of a pollutant for an array of points at various geographic distances from the plant. See generally *Cleveland Electric Illuminating Co.* v. *EPA*, 572 F.2d 1150, 1160 (6th Cir.), cert. denied, 439 U.S. 910 (1978). If the predicted values exceed the standards, the plant's emission limit must be made more stringent. *Ibid.*

3. On November 9, 1978, the Administrator of EPA approved, with exceptions immaterial here, a revision of Regulation X of the West Virginia State Implementation Plan for sulfur dioxide (SO_2) emissions. The revision relaxed emission limits for several power plants located in West Virginia, including the Harrison and Mitchell power plants located near the Pennsylvania border. The revision permitted the power plants to burn fuels of a higher

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[1] Requirements respecting clean air areas are set forth in Sections 165-169 of the Act, 42 U.S.C. (Supp. III) 7475-7479.

[2] "C.A. App." refers to the joint appendix in the court of appeals.

sulfur content than the existing state plan provisions permitted (43 Fed. Reg. 52239-52240; Pet. App. 41-47). Pennsylvania and a citizen group filed separate petitions to review that action in the Third Circuit; subsequently, the cases were consolidated. *Commonwealth of Pennsylvania* v. *EPA*, Nos. 79-1025, 79-1026. Petitioner and the affected power companies intervened as respondents. The principal contention of Pennsylvania and the citizen group involved EPA's evaluation of the impact of the revisions on air quality in Pennsylvania and the agency's PSD analysis (C.A. App. 1464-1475).

At EPA's request, the court remanded the case for reconsideration in light of certain defects in the record concerning the agency's PSD analysis and in light of the agency's failure to explain why certain meterological data had not been considered in its dispersion modeling analysis. On November 7, 1979, EPA again proposed to approve the revisions that affected the Harrison and Mitchell plants; EPA's proposed approval was based on an experimental analytic technique involving a statistical analysis of fuel variability over a nine year period for which meteorological data were available (44 Fed. Reg. 64439-64440; Pet. App. 48-51).

Pursuant to a scheduling order of the court, on November 10, 1980, EPA issued a final order approving the West Virginia revisions in part but disapproving the revision for the Harrison and Mitchell plants. Based on approved modeling techniques, EPA concluded that emissions from the Harrison and Mitchell plants would violate the secondary standard; accordingly, EPA required petitioner to revise its implementation plan to ensure compliance (45 Fed. Reg. 74478-74479; Pet. App. 52-58). EPA explained that its initial decision approving the revision for the

plants was based on an experimental statistical analysis of the variability of the sulfur content in fuel, an analysis the agency decided it could not rely on without further study and rulemaking (45 Fed. Reg. 74479; Pet. App. 56; C.A. App. 1462).

Petitioner participated actively in the proceedings before the Third Circuit from early 1979 through December 1980 without questioning that court's jurisdiction. Petitioner participated in two hearings during this period, one in 1979 in connection with EPA's motion for a remand, and one in 1980 dealing with EPA's motion for more time to comply with the court's remand order. Petitioner submitted no comments to EPA during the comment period preceding the November, 1980 action.

Following EPA's November, 1980 rulemaking, the Third Circuit established a briefing schedule for the pending cases. On December 1, 1980, the Commonwealth of Pennsylvania filed a new petition in the Third Circuit seeking review of EPA's November action. No. 80-2722. On December 29, 1980, petitioner sought review of EPA's November, 1980 action in the Fourth Circuit, which transferred the case to the Third Circuit. See 28 U.S.C. 2112(a). Petitioner moved the Third Circuit to transfer both cases to the Fourth Circuit, arguing that the Third Circuit lacked jurisdiction over the subject matter.[3]

4. The court of appeals rejected the challenge to its jurisdiction and upheld the Administrator's November, 1980 action (Pet. App. 37-38).

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[3] The principal issue presented in the consolidated cases was Pennsylvania's claim that EPA's analysis gave inadequate consideration to the effects of long range transport of pollutants into neighboring states. That issue is raised in *Commonwealth of Pennsylvania* v. *Gorsuch*, No. 81-1524, before this Court.

ARGUMENT

1. Section 307(b)(1) of the Act provides in pertinent part as follows (42 U.S.C. (Supp. III) 7607(b)(1); emphasis added):

> A petition for review of the Administrator's action in approving or promulgating an implementation plan under section 7410 of this title or section 7411(d) of this title * * * or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the *appropriate circuit.*

Petitioner contends (Pet. 23-28) that review of the Administrator's action approving or disapproving aspects of a state implementation plan under 42 U.S.C. (Supp. III) 7410 may be obtained only in the court of appeals with geographic jurisdiction of the state that submits the implementation plan, in this case, the Fourth Circuit. Petitioner appears to concede (Pet. 26) that regional action of the Administrator that affects a geographic area within the jurisdiction of more than one court of appeals can be challenged in any one of them. Nonetheless, petitioner argues that a different rule should govern challenges to approval or disapproval of state implementation plans. We submit, however that except to the extent the state submitting the implementation plan is also the area where the impact of the Administrator's actions with respect to the plan will be felt, it is difficult to understand why the identity of the submitting state is even pertinent to the question of the "appropriate circuit" for seeking review.

Generally, under Section 307(b)(1) it is the impact of the Administrator's action and not the identity of the state submitting the implementation plan that determines "the appropriate circuit." If the Administrator's action is "of nationwide scope or effect," the only "appropriate" court for seeking review is the United States Court of Appeals for the District of Columbia Circuit. 42 U.S.C. (Supp. III) 7607(b)(1). Local or regional action is reviewable in the other courts of appeals. If approval or disapproval of a state implementation plan has no effect outside the submitting state, the court of appeals with geographic jurisdiction in that state is normally "the appropriate circuit" for securing review within the meaning of Section 307(b)(1). If, on the other hand, the Administrator's approval of a state implementation plan has effects in other states, there is no basis for reading the provision to require that a petition for review be filed in the court of appeals with jurisdiction in the state that submitted the plan. After all, it is the Administrator's action and not that of the submitting state that is being challenged. If the Administrator's approval or disapproval of a state plan affects a region comprising the geographic jurisdiction of two or more courts of appeals, any of them may be "the appropriate circuit" for seeking review.[4] When Congress intended to limit judicial review to only one court, it did so explicitly. See,

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[4] The legislative history cited by petitioner (Pet. 25-26) only confirms this conclusion. It is the "U.S. Court of Appeals for the Circuit in which the *affected* air quality control region, or portion thereof, is located" that is the appropriate circuit for review of approval or promulgation of implementation plans. S. Rep. No. 91-1196, 91st Cong., 2d Sess. 41 (1970) (emphasis added).

e.g., Section 304(c)(1), 42 U.S.C. (Supp. III) 7604(c)(1) (certain citizen suits respecting violation of standards or limitations may only be brought in the district in which the source is located).

Petitioner contends (Pet. 25-26) that in the context of action approving or disapproving a state implementation plan the phrase "regionally applicable" in Section 307(b), refers to the legal enforceability of the state plan. As noted above, however, it is the Administrator's action that is the subject of judicial review, not the action of the submitting state. The enforceability of the state plan does not determine the impact of the Administrator's action. The consequences of the Administrator's approval of a state implementation plan may be significantly broader than the state's power to enforce its plan.

The Administrator's action with respect to the SO_2 revisions challenged in this case is "regionally applicable" because the sources are in West Virginia and the air quality in other states, including Pennsylvania, may be affected. Accordingly, both the Third and Fourth Circuits had jurisdiction to entertain the petitions for review. Under 28 U.S.C. 2112(a), the Third Circuit obtained exclusive jurisdiction since the first petition challenging the agency rule was filed in that circuit. *Public Service Commission for New York* v. *Federal Power Commission*, 472 F.2d 1270, 1272 (D.C. Cir. 1972).[5]

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[5] Petitioner's reliance (Pet. 24 & n.7) on *Peabody Coal Co.* v. *EPA*, 522 F.2d 1152, 1153 (8th Cir. 1975), is curious and clearly mistaken. The case arose under the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.* The judicial review provision of that statute (33 U.S.C. 1369(b)(1)(D)) places jurisdiction to review agency action in the circuit in

2. Petitioner's remaining arguments (Pet. 28-36) are directed at EPA's conclusion that the proposed relaxation of the SO_2 requirements applicable to the Harrison and Mitchell power plants would cause a violation of the national secondary ambient air quality standard.

Petitioner first argues (Pet. 28-32) that the Administrator failed to explain adequately why he reversed his position on the use of the experimental fuel variability analysis between November 7, 1979 and November 10, 1980, when the final rule was promulgated.[6] In his November 7, 1979 proposal to approve the revision, the Administrator specifically noted that the approval was based on a "formal statistical analysis * * * performed to account for fuel variability * * * in light of the *uniquely* extensive record of meteorological conditions" that was available (44 Fed. Reg. 64440 Pet. App. 50; emphasis added). In the final rule disapproving the revision as to the secondary SO_2 standard, the Administrator clearly explained the nature of the statistical analysis and why it could not be used to supplement the modeling techniques required by EPA's established guidelines (45 Fed. Reg. 74479; Pet. App. 56). Thus, petitioner's complaint is essentially that the Administrator refused to rely on the experimental analytic technique in lieu of EPA's estab-

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which the person challenging the action "resides or transacts * * * business." Further, the Eighth Circuit concluded that it *had* jurisdiction under that provision, but decided to transfer the petition to the circuit in which the effects of the government action would be felt (522 F.2d at 1152, 1153); a similar result is appropriate here.

[6] Petitioner failed to raise this argument in the court of appeals. Accordingly, the argument need not be considered in this Court. *E.g., Jenkins* v. *Anderson*, 447 U.S. 231, 234-235 n.1 (1980).

lished standards and criteria.[7] Compare *BASF Wyandotte Corp.* v. *Costle*, 598 F.2d 637, 644-646 (1st Cir. 1979). That the final rule differed from the proposal is of no consequence. See *International Harvester Co.* v. *Ruckelshaus*, 478 F.2d 615, 632 & n.51 (D.C. Cir. 1973); see also *Chrysler Corp.* v. *Department of Transportation*, 515 F.2d 1053, 1061 (6th Cir. 1975).

Petitioner's other major argument (Pet. 33-35) is that the Admiinstrator impermissibly relied upon EPA's modeling methodology for "Class A" meteorological stability, which, petitioner asserts, had been invalidated by the court of appeals for the Sixth Circuit in *Cincinnati Gas & Electric Co.* v. *EPA*, 578 F.2d 660 (1978).[8] Petitioner's arguments that (1) the holding of the court of appeals below is inconsistent with that of the Sixth Circuit and (2) the EPA uses

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[7] Several of the comments to the proposed rule had criticized reliance on the novel statistical analysis (C.A. App. 1467, 1473). EPA's supporting rationale document provided a detailed discussion of the reasons for the final action (C.A. App. 1449-1450, 1461-1463).

[8] Diffusion models, such as the one employed by EPA to predict pollutant concentrations caused by the power plants at issue, take into account thousands of bits of data. Meteorological data are among the most important, and "stability classes" are an aspect of meteorological data.

Stability classes are categorizations of the atmosphere's ability to disperse plumes. Atmospheric scientists divide them into six categories, ranging from extreme dispersion ("Class A") to minimum dispersion ("Class F"). Under Class A conditions, a plume is expected to disperse rapidly to the ground level before there is substantial dilution. This results in prediction of high ground level pollutant concentrations. The behavior of the plume is described by mathematical formulae called dispersion coefficients. The petitioners in *Cincinnati Gas & Electric* attacked the validity of one set of EPA's coefficients utilized under "gusty wind" conditions. See 578 F.2d at 662-664.

different rules for different regions, both rest upon this assertion. All of these arguments are premised on a fundamental misunderstanding of *Cincinnati Gas & Electric*; there is no conflict between the circuits, and the court of appeals correctly rejected petitioner's claim.[9]

In *Cincinnati Gas & Electric*, the Sixth Circuit did not find that the Class A modeling approach could not be used by EPA, as petitioner asserts (Pet. 35). Instead, the court found that the explanation in the record for EPA's decision to use a particular set of mathematical coefficients was inadequate. 578 F.2d at 663-664. The court accordingly remanded the issue to EPA "for further study," but specifically noted that the remand "might result in the writing of a new record which supplies the now missing support for the use of Class A coefficients." *Id.* at 664.

On remand, EPA reevaluated the use of its Class A approach and following a public comment period concluded that it was an appropriate method to analyze pollution levels caused by power plants like the Harrison and Mitchell plants. EPA proposed new technical support for the Class A approach on February 7, 1979 and solicited public comment. 44 Fed. Reg. 7798. EPA responded to those comments on June 19, 1980. 45 Fed. Reg. 41501. On November 7, 1980, EPA denied a petition for reconsideration

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[9] Petitioner never challenged EPA's methodology during the several comment periods provided by the Administrator, although the same "Class A" modeling assumptions underlay EPA's November 9, 1978 rule, its November 7, 1979 proposal, and its November 10, 1980 final rule. Having failed to raise the issue before the agency, petitioner could not properly raise the issue in the court of appeals. *United States* v. *L.A. Tucker Truck Lines*, 344 U.S. 33, 36-37 (1952); *Portland Cement Association* v. *Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973).

of its Class A decision. 45 Fed. Reg. 74041. Thus, by the time EPA acted on petitioner's implementation plan, it had already complied with the Sixth Circuit's remand order and reaffirmed the propriety of using the "Class A" coefficients.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10] Petitioner's final argument, that by disapproving the implementation plan revisions, EPA impermissibly invaded state sovereignty and violated the Clean Air Act (Pet. 32-33) is frivolous, at best. Once the Administrator found that the revised implementation plan would not assure attainment of the secondary national ambient air quality standard within a reasonable time, he was required to disapprove the revision and order it to be modified. Section 110(a)(2)(A), 42 U.S.C. (Supp. III) 7410(a)(2)(A). See generally *Ohio Environmental Council* v. *EPA*, 593 F.2d 24, 31-32, 33 (6th Cir. 1979).

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Petitioner's Reply Brief

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No. 81-1361

IN THE

Supreme Court of The United States

OCTOBER TERM, 1980

STATE OF WEST VIRGINIA, EX REL.
AIR POLLUTION CONTROL COMMISSION,
Petitioner-Appellant

v.

ANN GORSUCH, ADMINISTRATOR
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,
Respondent-Appellee.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF IN RESPONSE TO BRIEFS IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the State of West Virginia waive its objection to the subject matter jurisdiction and venue of the United States Court of Appeals for the Third Circuit to review an action of the United States Environmental Protection Agency's Administrator by waiting to challenge the Court's jurisdiction and venue until after compliance with the Court's order for remand requiring completion of a subsequent rulemaking by the Administrator premised on the possibility of mooting the case?

2. May the State of West Virginia challenge modelling techniques used by the United States Environmental Protection Agency without first questioning their use before the Agency when the U.S. EPA which originally used modelling techniques benefitting the State's position but then inexplicably and without notice, either in the Federal Register or informally, decided to no longer rely on those techniques?

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No. 81-1361

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF WEST VIRGINIA, EX REL.
AIR POLLUTION CONTROL COMMISSION,

Petitioners,

v.

ANN GORSUCH, Administrator, UNITED
STATES ENVIRONMENTAL PROTECTION AGENCY

REPLY BRIEF IN RESPONSE TO BRIEFS IN OPPOSITION

INTRODUCTION

The State of West Virginia hereby replies to various questions, points and factual assertions first raised in briefs opposing its Petition for a Writ of Certiorari. The briefs opposing our Petition chiefly rely on the argument that the Court below correctly decided the case and that this Court, therefore, need not review the decision. But while making such arguments, Respondents make tenuous legal arguments and false factual assertions to which we must

reply. Indeed the briefs filed in opposition must be carefully scrutinized by this Court since they cleverly mask and justify an erroneous Third Circuit Court of Appeals decision decided against legislative intent and cases of this Court concerning a major controversy of national importance on which a split among Circuits exist. (See, Pet. at 21-36.)

JURISDICTION TO REVIEW A STATE IMPLEMENTATION PLAN MUST TAKE PLACE IN THE COURT OF APPEALS IN WHICH THE SUBMITTING ENTITY IS LOCATED

The principle argument promoted by Respondents opposing our petition for review of the jurisdictional issue we raise is that under the facts of this case, the Third Circuit was the "appropriate circuit" to review the State Implementation Plan (SIP) under the jurisdictional grant contained in § 307(b)(1). Pennsylvania argues that such jurisdictional grant is really a venue provision and the Third Circuit was convenient and proper. (Pa. Br. at 6-10.) EPA on the other hand argues

that jurisdiction can be in several different circuits and that the Third Circuit was "appropriate" in this case since the SIP had an effect on another state. (EPA Br. at 7-8.) Thus, the Court is provided with three different interpretations of the Clean Air Act's judicial review provisions concerning SIPs--a fact which by itself points in favor of this Court's reviewing this nationally significant issue.

However, we must reply that the section at issue does not, as Pennsylvania asserts (Pa. Br. at 7), invest all United States circuit court of appeals with jurisdiction; rather only the "appropriate circuit" has jurisdiction. Since Congress possesses the power to create tribunals inferior to the Supreme Court and invests them with jurisdiction to act in particular ways, the issues of jurisdiction and venue are questions of congressional intent. Palmore v. United States, 411 U.S. 389 (1973). The question presented in our Petition is what did Congress intend?

The legislative history could not be clearer that Congress intended for SIP reviews to take place "in the U. S. Court of Appeals for the Circuit in which such locality, state or region is located." (1977 Leg. Hist. cited in Pet. at 25-26.) EPA's attempt to "confirm" their interpretation (EPA Br. at 7, n.4) while questioning "why the identity of the submitting state is even pertinent to the question of 'appropriate circuit'" (EPA Br. at 6) falls short of the mark. EPA's misconception of this section appears based on the premise that the local circuit court of appeals has jurisdiction anywhere the air quality is effected. (EPA Br. at 7.) The legislative history clearly indicates that the determining factor is not the location where air quality is effected but rather the location of air quality control region. An air quality control region (AQCR) is a geographical boundary designated for the purpose of developing SIPs to curb air pollution. 42 U.S.C. § 7407. In many instances, they are the submitting entity--especially in an interstate AQCR situation. See, NRDC v.

EPA, 475 F.2d 968 (D.C. Cir. 1973). Indeed, EPA's position in this regard is a little odd. In the lower court, EPA opposed Pennsylvania's petition for review because there was little or no air quality effects in Pennsylvania. (EPA Brief for Respondents at 13.)

Any doubt that may have existed on this issue was clarified by the 1977 Amendments cited above.

Both Respondents state that the language "appropriate circuit" means review can be had in more than one circuit by arguing that Congress could have restricted jurisdiction to only one court as it did in § 304(C)(1), 42 U.S.C. § 7604(c)(1) (EPA Br. at 7-8), and by relying on a pre-1977 amendment case, NRDC v. EPA, supra, (Pa. Br. at 7-8). Please note that the judicial review provision in question goes to orders concerning single sources as well as SIPs. Since individual sources are only located in one judicial circuit [see e.g., § 304(C)(1); 42 U.S.C. § 7604(c)(1)], and air quality control regions often encompass interstate and

inter-judicial circuit areas see, NRDC v. EPA, supra, the phrase "appropriate circuit" was used to cover both situations with the legislative history clarifying the intent to ensure that the source or submitting entity's location is the dispositive factor. (See also, Pet. at 26, n.9.) Thus, the answer to EPA's question concerning the relevancy of the submitting state's location is discovered--because Congress required the entity's location to be the key factor!

But why should the submitting state's or entity's location be relevant? The obvious answer is that Congress was attempting to provide for consistency of judicial review. As explained in a case decided under the Clean Water Act, 33 U.S.C. § 1251 et seq., Peabody Coal Co.v. EPA, 522 F.2d 1150 (8th Cir. 1975), regular adjudication of an ongoing administrative program of long duration benefits from being consistently decided by the same court. Indeed, under the Third Circuit's decision and the rationale proposed by Respondents, inconsistent

interpretations of requirements under West Virginia's or other SIPs are enhanced because of the many different courts which could review a single SIP. Indeed, under EPA and Pennsylvania's rationale, not only could Maine sue EPA in its local circuit (i.e., First Circuit) over Indiana's SIP, (Pet. at 27-28), but each downwind state could file in their respective local circuit on the same SIP and the only legal guideline for determining which circuit is "appropriate" would be under 28 U.S.C. § 2112(a) and a case-by-case determination based on convenience. Thus, any benefit from consistent review will be lost and a lot of judicial time will be wasted in an area where congressinal intent is clear.

Pennsylvania points to allegedly contrary legislative history indicating that the 1977 amendments to Section 307(b)(1) dealt with the question of "exclusive jurisdiction" (Pa. Br. at 6). That phrase was used in connection with a different jurisdictional grant under § 307(b)(1) and not the jurisdictional section relating to SIP reviews.

Both Respondents imply that West Virginia did not raise a timely objection. (Pa. Br. at 4; EPA Br. at 5.) Jurisdictional issues are not waivable. Gutierrez v. Waterman Steamship Corp., 373 U.S. 206 (1963); Mt. Healthy Board of Education v. Doyle, 429 U.S. 274 (1977); Panhandle Eastern Pipe Line Co. v. Federal Power Commission, 324 U.S. 635 (1944). And it is admitted by Respondents that we did challenge the Third Circuit's jurisdiction (Pa. Br. at 4; EPA Br. at 6.)

But even if the phrase is construed to be venue related, our objection to the Court's exercising its power over the issues was timely raised. The State did not intervene in the case until nine months after the action was instituted by Pennsylvania and EPA had already been granted a voluntary remand to reconsider certain issues. Raising our challenge to the Court's authority would have been wasteful of judicial resources and inappropriate until after EPA finalized its position. EPA's remand request below was premised on the possibility of mooting the case by administrative

action (see, EPA Motion for Remand, p. 7). Thus, the Court might not have to consider the jurisdictional issue at all. Secondly, and more importantly, jurisdiction under the Clean Air Act is based on the nature of the claims raised. District of Columbia v. Train, 533 F.2d 1250, 1252 (D.C. Cir. 1976); Oljato Chapter of Navajo Tribe v. Train, 515 F.2d 654 (D.C. Cir. 1975); Getty Oil Corp. v. Ruckelshaus, 467 F.2d 349 (3rd Cir. 1973); cert. denied, 409 U.S. 1125 (1973). Consequently, until EPA finalized its position so Petitioners could finalize their claims, it was inappropriate to raise jurisdiction since it was unclear in which court the case belonged [see, e.g., Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C. 1972), aff'd on the basis of the district court's opinion, 4 ERC 1815 (1972) aff'd by equally divided court sub nom. Fri v. Sierra Club, 412 U.S. 541 (1973); City of Highland Park v. Train, 519 F.2d 681 (7th Cir. 1975); cert. denied, 424 U.S. 927 (1975); NRDC v. EPA, 484 F.2d 1331 (1st. Cir. 1973)] Of course, EPA unexplainedly reversed its position and we also petitioned for review, but in

the Fourth Circuit. But in any case, the reasonableness of the party's conduct will be assessed in determining whether a waiver of venue has occurred. Cf. Commerical Casualty Ins. Co. v. Consolidated Stone Co., 278 U.S. 177 (1929).

Finally Pennsylvania's comment that we never offered a compelling reason for transfer to the Fourth Circuit is false. Not only did we assert that the Third Circuit lacked jurisdiction, but we urged the Third Circuit to transfer in consideration that the Fourth Circuit normally considers West Virginia SIP reviews and we sought to prevent inconsistent adjudications of our SIP.

In summary, the judicial review provisions of the Clean Air Act have been labeled confusing. District of Columbia v. Train, supra. This Court should move to clear up such confusion.

WEST VIRGINIA HAS NOT WAIVED ANY OF THE ARGUMENTS PRESENTED IN ITS PETITION FOR WRIT OF CERTIORARI

EPA attempts to convince this Court that nationally significant issues concerning their modelling techniques and failure to explain their changes in policy should not be heard because we failed to raise them either before the agency or before the Court below. (EPA Br. at 6 and 9). Both arguments are misleading and wrong.

Relying on Portland Cement Association v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), EPA asserts that our failure to question the use of Class "A" modelling assumptions underlying the EPA decisions prohibits us from raising it now.

First, the issue was before the agency. The author of the EPA rationale document labeled reliance on rare Class "A" stability meteorological conditions "indefensable" (Index No. 54, A. 736). EPA's Rationale Document for the first approval of the limits was based on the

rationale that the predicted violation was due to a rare meteorological event. (Index No. 130, A. 1690.) Thus, EPA confronted the Class "A" stability issue and decided it in our favor. An issue before an Agency is properly before a Court on review even if a different party raises it. ASARCO, INC. v. EPA, 578 F.2d 319, 320 n.1 (D.C. Cir. 1978).

Secondly, the rule precluding judicial review of issues not raised before the agency is not absolute. It is dependent upon whether the issues should or could have been raised. Portland Cement Assoc. v. Ruckelshaus, supra. In Portland Cement, (the case upon which EPA relies to preclude judicial review of our claim) the Court remanded the issues to the agency rather than dismissing the claims because Petitioners did not know EPA's position until it was too late to raise the issues. Id. This is precisely our situation. EPA abruptly and inexplicably decided to rely upon the "A" stability modeling. Should we be required to raise issues which (1) EPA was already aware of and (2) had

resolved in our favor? A party need not raise every issue possibly pertinent to a proceeding just on the outside chance that the Agency might change it mind. Without any indication either in the Federal Register or informally that EPA was unfavorably considering the "A" stability modelled data, there was no duty on the State to raise it. Portland Cement Co. v. Ruckelshaus, supra. Consequently, any decision of the Third Circuit based on this reasoning is erroneous and also raises an issue which is in conflict with other Circuits.

Finally, in regard to the Class "A" stability issue, EPA attempts to claim that we misread and misinterpret the Sixth Circuit's decision in Cincinnati Gas & Electric Co. v. EPA, 578 F.2d 660 (6th Cir. 1978). If we do, then so does EPA! (Compare Pet. at 15 n.4 and 35 with EPA Br. at 11.) All we ask is for equal treatment. We requested that the Third Circuit remand EPA's decision for a study to justify use of "A" stability as did the Sixth Circuit. The Third Circuit refused. The fact that EPA has apparently justified using "A" stability

modelling data in Ohio, does not mean that it is justified in West Virginia. Our rulemaking was different; our terrain (which influences stability classes) is very different from Ohio's. Our modelling used nine years of meteorological data rather than the one year used in Ohio (Belanger memo, p. 6).

Consequently, review by this Court is necessary to settle whether use of Class "A" stability must be accompanied by a study justifying its use. This issue, in which there is a conflict between the Third and Sixth Circuits affects all fifty states.

EPA also claims that we failed in the Court below to raise the argument that the Administrator changed his mind without adequate explanation. We did raise it! (Brief of West Virginia, at 38-43.) Regardless of whether the final rule differed from the proposed rule (EPA Br. at 10), EPA cannot reverse a previous final rulemaking approving our limits without giving an adequate explanation! (Pet. at 29 and Question Presented No. 3.) Since EPA's cavalier

attitude toward rulemaking has national significance, this Court should grant our Petition.

EPA DID NOT BASE ITS INITIAL DECISION ON THE STATISTICAL PROBABILITY METHOD

Finally, EPA asserts that its initial decision approving the SIP revision was based on the experimental statistical method. (EPA Br. at 4-5.) That is false! EPA's initial decision approving the SIP revisions on November 9, 1978, did not use the statistical method. In fact, the Belanger Memo, produced after the initial decision and during the voluntary remand below, states as such: "At your request, I have now supplemented my judgment * * *." (Belanger Memo, p. 9.)

CONCLUSION

For the above-cited reasons, the State of West Virginia respectfully urges this Court to discount and refuse to give any weight to the Briefs filed

in opposition and to grant our Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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